

Memorandum

To: LPA

From: Walter Fluegel, Community Development Director

Date: June 9, 2011

Re: Consumption On-Premises (COP) in Recreation Future Land Use/EC Zoning District
Workshop Discussion for June LPA Meeting

The purpose of this memo is to have a workshop discussion of the issues surrounding the extension of premises of COP in the EC Zoning District and a conversation on potential regulatory approaches.

In order to facilitate the conversation, I have attached the following documents for background information:

1. A copy of the LPA Chairs memo, dated May 10, 2011, regarding her review of the Land Development Code as it relates to COP in EC/REC;
2. Copy of COP alternative language proposed by LPA Member Ryffel (strike through/underline version and normal version);
3. A copy of my memo to the LPA dated May 4, 2011

In order to facilitate a constructive dialogue, I would suggest that we review the LPA Chair's memo first and discuss her comments in a line by line fashion, to explore LPA and Staff's comments on each issue. Then I would suggest we explore the two options regarding overall permissibility of COP in EC, which include:

1. Outright prohibition of all COP in EC, or
2. Regulatory options for permitting COP in EC (service and consumption or consumption only).

Regarding the second option of regulating COP in EC, I would suggest that the dialogue focus on if COP is to be allowed in EC, then what is the best way to regulate it. The considerations for regulatory mechanisms can be considered in the following task groups:

1. Procedure (i.e. Special Exception, Administrative Approval, Permitted Use, Planned Development Zoning, Conditional Use, etc.);

2. Geographic restrictions- Should COP in EC be restricted to specific geographic area(s);
3. Principal Use Restrictions- Should COP in EC be limited as an ancillary use to specific principal uses, i.e. restaurants, bars, resorts, etc.; and
4. Specific Conditions of Approval- What specific conditions should be required, for example:
 - a. Plastic cups, aluminum cans or glass bottles.
 - b. Hours of service/consumption in EC.
 - c. Location restrictions of service/consumption in EC, i.e. within property lines under same ownership and no closer than 10 feet of the Mean High Water Line (MHW).
 - d. Restrictions on tables.
 - e. Management/maintenance responsibilities of owners.
 - f. Security requirements.
 - g. Signage requirements, i.e. alcohol purchased on one property is prohibited from being taken onto another property.
 - h. Insurance requirements.
 - i. Seasonal restrictions, i.e. should hours of service/consumption be further restricted during times of the year, such a turtle nesting season.
 - j. Annual renewal requirements.
 - k. Terms of revocation and revocation process.
 - l. Fees, i.e. initial fee and annual renewal fees.
 - m. Other considerations that LPA deems appropriate.

In order to prioritize Community Development Department's work schedule and productivity, I have established the following work schedule for this endeavor:

June- Workshop

July-Workshop

August- Public Hearing

COP EXPANSION IN THE ENVIRONMENTALLY CRITICAL ZONE/RECREATION FLUM
AN LDC REVIEW PREPARED BY JOANNE SHAMP, CHAIR, LPA
MAY 10, 2011

The Town Council rejected LPA Resolution 2009-24, deciding that the Land Development Code is the more appropriate place to identify more specific permissible uses relating to the expansion of COP onto the beaches in the EC Zone/Recreation FLUM. The LPA provides its role as described in the LDC as follows: **Sec. 34-120(4)** "The function of the Land Planning Agency in accordance with LDC is to review proposed land development changes and amendments thereto, and make recommendation to the Town Council as to their consistency with the Comprehensive Plan"; and **Sec. 34-120(2)** "the function and duty of the LPA is to prepare policies for guiding land uses in the town in order to preserve the unique and natural characteristics of the island."

In reviewing the LDC, references are found to indicate that the proposed COP expansion is prohibited. LDC **Sec. 14-3(a)(15)** states that it is "unlawful or prohibited for any person to do, conduct or permit any commercial activities on the beach or dunes not explicitly authorized by this code or other town ordinances." There exists no explicit authorization of this COP expansion in the Comp Plan (see report "Policy Considerations and Options: Consumption of Alcoholic Beverages"), the LDC or in Town ordinances.

The Land Development Code's strongest prohibition to the proposed COP expansion is **LDC Sec. 34-1574 (b)** "Except in instances of overriding public interest, new roads, private land development, or the expansion of existing facilities within Wetlands or on the sandy beaches that are designated in the Recreation category in the Fort Myers Beach Comprehensive Plan shall be prohibited." No evidence of overriding public interest has been presented to the LPA.

LDC regulations support the legal relationship between the Comprehensive Plan and the LDC regarding COP expansion on the beaches. LDC **Sec. 34-652(a)** designates the purpose of the EC zoning is to designate that the preservation of beaches is critical to the Town of Fort Myers Beach and restricts the uses. In **Sec. 34-652(b)** the application of the EC district is intended to prevent a public harm by precluding the use of land for purposes that adversely affect a defined public interest. **Sec. 34-609** states that where there are conflicts between the LDC and the Comp Plan regarding development in zoning districts, the Comp Plan will prevail.

The LDC limits COP expansion "by right" in the EC Zone. **Sec. 34-652(d)** states that no land use in the EC Zone shall be permitted by right except those permitted by the Fort Myers Beach Comprehensive Plan and **Sec. 34-613(c)** states that development rights may be limited by other factors such as the Fort Myers Beach Comprehensive Plan and conditions on special exceptions and special permits.

COP expansion is also not permitted as an accessory or ancillary use in the Land Development Code. LDC **Sec. 34-1262** states that premises used for the purpose of the retail sale, service or consumption of alcoholic beverages must conform with all applicable town regulations. Those beachfront COP premises that are parcels split by zoning boundaries are regulated by **Sec. 34-617(b)**: "when a parcel is split between two or more zoning districts each parcel is limited only

to the permitted uses allowed in that portion, plus allowable accessory uses”, while “accessory uses may not be placed on portions of the parcels that do not contain the principal use to which they are incidental and subordinate.”

LDC **Sec. 34-677(b)(3)** refers to the regulation of the sale of alcoholic beverages outdoors in Sec. 34-1264, which states that “the area designated for an alcoholic beverage permit cannot be expanded without filing a new application for an alcoholic beverage permit covering the existing and proposed expanded area” (**Sec. 34-1264(g)**).

With regard to a proposed administrative approval of such COP expansion, **Sec. 34-1264(a)(2)a.2** states that administrative approval may not be granted for outdoor seating within 500 feet of a park or dwelling unit under separate ownership. In addition, **Sec. 34-1264(a)(1)** states that administrative approval of the expansion of on-premises consumption of alcoholic beverages may not be the appropriate action when there is a record of public opposition to a similar use at that location. The **Comp Plan** provides further safeguards, for example requiring the Town to provide procedural protection comparable to the public hearing process in the Mixed Residential FLUM category.

A restriction or prohibition to this commercial expansion is addressed by Comp Plan **POLICY 4-C-2** directing that intensity in any FLUM category is limited by provisions of the Comp Plan and LDC. **Comp Plan POLICY 4-C-2** requires the LDC to specify maximum commercial intensities using the floor-area-ratio (FAR). The maximum intensity may not include land in the Recreation FLUM according to LDC **Sec. 34-633(2)**: *“a site’s lot area includes the gross square footage within the site’s private property line, minus wetlands, canals or other water bodies, and minus any land designated “Recreation” on the Comprehensive Plan’s future land use map.”* Land in the Recreation FLUM Category is not available for commercial expansion.

Expansion of area for this COP service would require additional parking, per **Sec. 34-20209(b)(1)** which states that “existing uses enlarged in terms of floor area shall provide additional parking spaces in accordance with Sec. 34-2020(d)(2)h.2” and **Sec. 34-2020(d)(2)h.2**, which states additional parking is required for outdoor seating for restaurants, bars and cocktail lounges.

COP expansion and beach definitions are limited by the new mean high water line (ECL) and state owned beachfront in the current navigation/re-nourishment project per (**F.S. 161.191 (1)**): “the ECL recorded in accordance with a beach re-nourishment project shall be the new high water line and all land seaward of that line are the sovereign property of the State of Florida.”

Limiting the expansion of COP to specific zoning districts would fall under several regulations of the Comp Plan and LDC. The **FLUM ELEMENT** of the **COMP PLAN** states that the Town can insist on protection of its private realm and the enhancement of its public realm when evaluating for new commercial development, providing for protection of residential interests. Even in the Downtown area, the map in **Sec. 34-672, Figure 34-6** of the Downtown Zoning district shows the beaches and land seaward of the Coastal Construction Line (CL) to be outside the zoning district, as if intentionally protected from land use development.

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COP OPTIONS

Option 1

1A. COP will be permitted on the beach of on any property with an existing COP license, up to 10' landward of the interface between the wet and dry sand with an existing COP license, and located in the Times Square area only subject to any reasonable conditions, including, but not limited to that alcohol must be purchased at the existing bar(s) to be consumed on the beach. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

Alternative to Option 1A

1A. COP will be permitted on the beach of any property with an existing COP license up to 10' landward of the interface between the wet and dry sand and located in the Times Square area only subject to any reasonable conditions, including but not limited to that there will be no tables or carts of any kind, however powered, on the beach. (This would allow wait staff, sales and service)

1B. Properties outside the Times Square area with existing COP licenses, (not including those whose COP was approved as part of a planned development) may seek approval via a Special Exception. Alcohol must be purchased at the existing bar(s) to be consumed on the beach up to 10' landward of the interface between the wet and dry sand. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

1C. Properties with COP approved as part of the Planned Development process must request permission for consumption on the beach via an amendment to their approved planned development. Alcohol may be consumed up to 10' landward of the interface between the wet and dry sand. Alcohol must be purchased at the existing bar(s) to be consumed on the beach. There will be no sales, wait staff, tables or carts however powered, of any kind, on the beach.

Option 2

2.A At any facility on the beachfront with an existing COP license, alcohol may be consumed on the beach owned by the business or owner of the property up to 10' landward of the interface between the wet and dry sand. All purchases must be made from the existing bar(s) on the property and may be consumed on the beach. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

For any of these there may need to be an amendment to the Open Container Ordinance to provide for these options.

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COP OPTIONS

Option 1

1A. COP will be permitted on the beach ~~of on~~ any property with an existing COP license, up to ~~within 50' mean high tide line~~ 10' landward of the interface between the wet and dry sand ~~with an existing COP license~~, and located in the Times Square area only subject to any reasonable conditions, including, but not limited to that alcohol must be purchased at the existing bar(s) to be consumed on the beach. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

Alternative to Option 1A

1A. COP will be permitted on the beach ~~of on~~ any property with an existing COP license up to 10' landward of the interface between the wet and dry sand ~~within 50' of the mean high tide line with an existing COP license~~, and located in the Times Square area only subject to any reasonable conditions, including but not limited to that there will be no tables or carts of any kind, however powered, on the beach. (This would allow wait staff, sales and service)

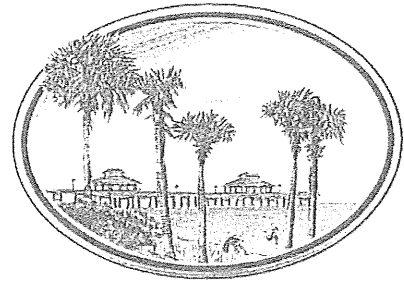
1B. Properties outside the Times Square area with existing COP licenses, (not including those whose COP was approved as part of a planned development) may seek approval via a Special Exception. Alcohol must be purchased at the existing bar(s) to be consumed on the beach to 10' landward of the interface between the wet and dry sand ~~within 50' of the mean high tide~~. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.

1C. Properties with COP approved as part of the Planned Development process must request permission for consumption on the beach via an amendment to their approved planned development. Alcohol may be consumed up to 10' landward of the interface between the wet and dry sand ~~within 50' of the mean high tide~~. Alcohol must be purchased at the existing bar(s) to be consumed on the beach. There will be no sales, wait staff, tables or carts however powered, of any kind, on the beach.

Option 2


2.A At any facility on the beachfront with an existing COP license, alcohol may be consumed on the beach owned by the business or owner of the property up to 10' landward of the interface between the wet and dry sand ~~50' of the mean high tide line~~. All purchases must be made from the existing bar(s) on the property and may be consumed on the beach. There will be no sales, wait staff, tables or carts of any kind, however powered, on the beach.
For any of these there may need to be an amendment to the Open Container Ordinance to provide for these options.

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Memorandum

To: LPA

From: Walter Fluegel, Community Development Director 

Date: May 4, 2011

Re: Consumption On-Premises (COP) in Recreation Future Land Use/EC Zoning District

The purpose of this memo is to facilitate a broader understanding of the issues surrounding the extension of premises to allow COP in the EC Zoning District and a conversation on potential regulatory approaches, while providing an overview of the evolution of the overall issue of COP in the Recreation Future Land Use category.

We'll start with a summary overview of the COP in the Recreation Future Land Use category issue, in as much as, only four of the current LPA members were members at the time this issue came before the LPA. On November 10, 2009, a report, titled "Policy Considerations and Options: Consumption of Alcoholic Beverages" (EXHIBIT 1) was presented to the LPA for their consideration. The report was commissioned by a former Town Manager and prepared by the former Community Development Director. In regards to the issue of COP on the Gulf Beaches, the report concluded, "The Plan does not clearly provide for the expansion of permitted COP onto the Gulf beaches, neither does it clearly prohibit it." At that LPA Meeting, as memorialized in LPA Resolution 2009-24 (EXHIBIT 2), the LPA Voted 5 to 1 to recommend that the Comprehensive Plan: "does restrict further expansion of on-premises consumption of alcoholic beverages on the Gulf beaches within the Town of Fort Myers Beach." The net affect of this opinion on the part of LPA was to recommend to Town Council that in the form of a Legislative Interpretation, as provided for in Chapter 15 of the Plan, was to determine that it was the intent of the Plan to further restrict the expansion of COP in the Recreation Future Land Use category.

At the November 15, 2010 Town Council Workshop, Staff presented a Memo, dated, November 8, 2010 (EXHIBIT 3) that reviewed the issue and provided potential options for Council's consideration. At Council's direction, Staff crafted several regulatory options for Council's consideration. At the December 6, 2010 Town Council Meeting, Council voted 4 to 1 to reject the LPA's Resolution and by rejecting the LPA's motion, Council's vote, in essence, deemed COP to be a permissible use on the beaches. Being that this was a Legislative Interpretation, as provided for in Chapter 15 of the Comprehensive Plan, it would now require a text amendment to reverse this determination. Further, in a subsequent motion and discussion, Council determined that the Land Development Code was the appropriate place to regulate permissible uses and directed Staff to prepare an ordinance dealing with COP in EC

as a permitted ancillary use. The motion and vote were based upon the Blue Sheet and Memo prepared for Council's consideration (EXHIBIT 4).

As Staff contemplated in the November 30, 2010 Memo, there were five potential ways to regulate COP in EC, should Council reject LPA's Resolution:

- A. Direct Staff to prepare a Land Development Code Amendment specifically identifying COP as a **Permitted Use** in the Environmentally Critical Zoning District. Or;
- B. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use. Or;
- C. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use. Or;
- D. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **Special Exception** to an adjacent approved COP use, **in specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) **or to a specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc). Or;
- E. Direct Staff to prepare a Land Development Code Amendment to identify COP in the Environmentally Critical Zoning District as a **permitted ancillary use** to an adjacent approved COP use, **in specific geographic areas** (i.e. Downtown Core Area as identified in the Comprehensive Plan) **or to a specific primary COP use(s)** (i.e. resort, restaurant, bar, hotel, etc).

In order to provide LPA with some context for this conversation, it is important to give consideration to some of Staff's original and subsequent concerns regarding COP in EC:

1. One of Staff's primary concerns has been a glaring loophole in the Code of Ordinances (this issue is not addressed in the Land Development Code), as it relates to "open container." Currently, the Code of Ordinances offers the following restrictions on open container:

Sec. 4-66. - Consumption or possession of alcoholic beverages on a semipublic parking lot, public way parking lot or beach.

It shall be unlawful and punishable as provided herein to:

- (1) Drink or consume any alcoholic beverage on a semipublic parking lot, or a public street, sidewalk, parkway, beach, or parking lot located in the town.*
- (2) Transport, carry, or possess any alcoholic beverage, except in the original*

- package and with the seal unbroken, on a semipublic parking lot, or a public street, sidewalk, parkway, beach, or parking lot located in the town.*
- (3) Possess an open container of an alcoholic beverage while operating a vehicle or while a passenger in or on a vehicle being operated.*

Public beach means any beach which:

- (1) Is below the mean high-water lines;*
(2) Is owned by the town or the county;
(3) Has arisen upon it a right of customary use by the public;
(4) Has arisen upon it a public easement, prescriptive or otherwise; or
(5) Is the fore shore of tidal navigable waters, that is the land between the high-water mark and the low-water mark, and is owned by the state.

Staff's concern regarding this language is the fact that it is the only place in Town regulations, where COP in EC is directly dealt with and the language is vague and susceptible to challenge. For example, the prohibition to consumption on the "public" beach, technically, could be deemed to only be that area below the mean high-water line and/or beach property owned by the town or the county. In essence, for the Town to deem areas of the beach as "public beach" by a right of customary use by the public and then argue that the prohibition would extend to those areas could constitute a substantial imposition on the private property rights of beachfront property owners. For instance, if the Town were to make a determination that the beach in front (i.e. that area between the homeowner's platted lot and the mean-high water line) of a homeowner's lot, were in fact public, it could preclude the Sheriff's Office from trespassing individuals utilizing those areas and thus deprive the homeowner of peaceable enjoyment of their own property. Oddly enough, to make the determination that the beach in front of a property owners home is "public beach" would deprive the property owner of the right to enjoy a beer on their own beach property, while allowing the public to enjoy use of their property.

2. Another area of ongoing concern to Staff has been the fact that ancillary retail service uses have already been established as permitted uses in the EC Zoning District, such as Parasailing, Beach Chair Rentals and Jet-Ski Rentals. Given that the veil of commercial utilization of the beaches has already been pierced, the potential for challenge is a possibility. Also, it should be noted that COP has already been established in EC in the form of Special Event permits. Accordingly, Staff believes it is imperative to establish a regulatory framework to regulate the potential for unwanted expansion of COP on the beaches. Further, consideration should be given to the fact that uses such as parasailing and jet-ski rentals have been established in EC regardless of, and independent of, upland Planned Development Zoned areas.
3. Staff is concerned about the potential ramifications of expansion of COP in EC beyond the currently three "grandfathered" establishments of Top O'Mast, Lani Kai and Beach Pub. Accordingly, Staff conducted an assessment of existing COP in

upland zoning districts along the beach that could avail themselves of any change in regulations. Staff has determined that there are 15 establishments that could avail themselves of any change in regulations, as depicted in EXHIBIT 5. Of the 15, 8 are resorts, 2 are bars, 3 are bar/restaurants and 2 are restaurants. Further, of the 15, 6 are located in the Downtown Zoning District. Of the 9 not located in the Downtown, 6 are resorts, 2 are bars and 1 is a bar/restaurant.

In our estimation, it is reasonable to believe that of the locations outside of the Downtown, the resorts tend to be self-regulating by virtue of the risk of alienation of the clientele they serve. Accordingly, Council's directive to prepare an "administrative approval" approach appears to be reasonable, if a regulatory framework can be developed to deal with all of these establishments (existing and potential extensions of premises) in a consistent and fair manner that ensures the safety and welfare of the public, while protecting community character.

4. Staff is working on a revised draft of the COP in EC ordinance, which attempts to provide reasonable regulations for ensuring the safety and welfare of the public, while protecting community character. These working draft contemplates:
 - An Administrative Approval process for the aforementioned existing establishments;
 - Provisions for the revocation of the extension of premises for non-compliance with the requirements set forth in the ordinance;
 - Extension of premises only for property under the same ownership as the upland permitted establishment and within the same property lines;
 - Prohibition of patrons bringing their own coolers onto the establishment's beach;
 - Requirement for biodegradable containers;
 - Requirement to maintain the beach free of litter and debris;
 - Requirement for signage prohibiting patrons from moving between properties with alcohol;
 - Hours of service limitations for extension of premises onto the beach, limited to the hours of 11:00AM to sunset;
 - Restriction prohibiting service within 50' of Mean-High Water line;
 - Requirement for a Special Exception to allow entertainment in EC;
 - Requirement for tables to be buffered seaward on the beach by dune vegetation;
 - Requirement for a Certificate of Insurance covering the expanded area;
 - Requirement for Annual Certificate of Use Approval for the extension of premises;

-Establishment of fees for the Administrative Approval and for the Annual Certificate of Use and for future Special Exceptions adjacent to EC.

-Requirement that any new establishments requesting COP will be required to obtain extension of premises into EC through a Special Exception, as a component of the Special Exception for the upland establishment;

5. Should the LPA deem it more appropriate to develop an alternative regulatory scheme, such as Special Exceptions, Principal Use Restrictions (i.e. restricting extension of premises to resorts only) and/or Geographic Restrictions (i.e. restricting extension of premises to a specific area, such as the Downtown Zoning District), Staff can prepare parallel ordinances for Town Council's consideration.

We welcome your input on alternative regulatory approaches and questions/input on the proposed regulatory approach.

In order to conserve time and paper, the remainder of the 70 pages of information to this Memo is contained in last month's LPA packet which you already have.

Thank you.